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Reports

S. R. FOX v. EK LIONG HIN LTD.

[O. C. J. (Whyatt C.J.) January 14, 1957]

[Singapore — Civil Suit No. 1103 of 1955]

Master and Servant — Contract of employment — Wrongful dismissal — Immediate dismissal — Alleged acts of misconduct — Onus of proof — Damages — Income tax deductions.

In this case the plaintiff, a master mariner, entered into a contract with the defendants to serve as a captain of one of their ships for a period of 12 months, but 4 months before the contract was due to expire, the defendants summarily dismissed him from their service. The plaintiff claimed damages for wrongful dismissal. In their defence the defendants alleged that plaintiff had committed various acts of misconduct which entitled them to terminate the contract.

Held: (1) the onus rested on the defendants to prove that the complaints alleged in their defence were well-founded and justify the dismissal;

(2) in this case the defendants have failed to substantiate any of the complaints alleged against the plaintiff;

(3) immediate dismissal of an employee is a strong measure, and in this case the defendants have completely failed to justify such a measure. Accordingly the plaintiff was entitled to damages;

(4) damages cannot include compensation for the manner of dismissal, for injured feelings or for loss sustained by reason of the fact that the dismissal of itself made it more difficult to obtain fresh employment;

(5) wrongful dismissal may be accompanied by circumstances which give rise to a separate cause of action and when this occurs the remedy does not merge with the proceedings for wrongful dismissal, but remains available at law to the plaintiff if he wished to pursue it;

(6) the damages for wrongful dismissal are limited to (i) compensation for loss of the emoluments which would have been earned but for the breach of contract, and possibly (ii) compensation in respect of the time which might reasonably elapse before the plaintiff could obtain fresh employment. In this case the 4 months between the date of the wrongful dismissal and the date when the contract would have expired was a reasonable period in which the plaintiff could seek fresh employment, consequently no damages under (ii) were recoverable.

(7) the special damages for salary and other emoluments for the period ending on the date when the contract would have expired should be reduced by the amount of income tax the plaintiff would have had to pay.

Cases referred to :—

(1) *Savage v. British India Steam Navigation Co. Ltd.* 46 T.L.R. 295.

(2) *Jupiter General Insurance Co. v. Shroff* (1937) 3 All E.R. 67.

(3) *Beach v. Reed Corrugated Cases Ltd.* (1956) 1 W.L.R. 807.

(4) *British Transport Commission v. Gourley* (1956) A.C. 185; (1956) 2 W.L.R. 41.

(5) *Addis v. Gramophone Co.* (1909) A.C. 488.

ACTION FOR DAMAGES.

Syed Esa Almenoar for the plaintiff.

J. L. P. Harris for the defendants.

The facts appear sufficiently from the judgment.

Whyatt C.J. : — On the 27th October 1954, the plaintiff who is a master mariner entered into a contract with the defendants to serve as captain of one of their ships, the M.V. New Susana, for a period of twelve months but on the 29th June 1955, four months before the contract was due to expire, the defendants summarily dismissed him from their service. The plaintiff, thereupon, instituted these proceedings claiming damages for wrongful dismissal and the defendants by their defence alleged that the plaintiff had committed various acts of misconduct which entitled them to terminate the contract. The question I have to decide is whether the complaints set out in the defence are well-founded, and if so, whether they are sufficient to justify the action taken by the defendants, but before examining these matters in detail, it will be convenient and helpful to consider the background of events which preceded the dismissal of the plaintiff on the 29th June 1955.

The plaintiff first entered the service of the defendants in July 1947 and remained in their employment for two and a half years until the end of 1949. During that time he was in command of several vessels belonging to the defendants and when he left their service on the 31st December 1949 the defendants gave him a written testimonial in which they stated that he had at all times proved himself capable, painstaking and thoroughly reliable and that they had pleasure in recommending him to any one who might require his services. It was a very good testimonial. There followed a gap of three years before the plaintiff rejoined the defendants' service in October 1953. He signed a twelve months' contract and when it expired in October 1954, the plaintiff and the defendants entered into another contract on identical terms for a further period of twelve months, and it was this contract which was summarily terminated on the 29th June 1955.

The first signs of friction between the plaintiff and the defendants began to appear shortly after the signing of this last contract. When the plaintiff arrived in Singapore from Sourabaya in November 1954, he was informed by the defendants' shipping manager, Lim Tok Seng, that his ship, which normally ran between Singapore and Indonesian ports, had been

chartered for voyages between Singapore and Indo-China. The plaintiff protested that a vessel of the size of the New Susana — she was only 587 tons (gross tonnage) and 269 tons (nett tonnage) — was not suitable for this route as it involved beating up against the full force of the north east monsoon in the South China Sea but the defendants insisted on the charter being carried out and during the period from December 1954 to March 1955, the plaintiff did four voyages between Singapore, Saigon and Pnom Penh. The plaintiff's misgivings about the suitability of the New Susana for these trips were more than confirmed by his actual experience. On one of the voyages, according to his evidence, he took such a beating as he had never taken since he went to sea when he was eighteen years of age. The compass was carried away, the wireless put out of action, the wireless cabin turned into a shambles and the lifeboat severely damaged. A further serious complication resulting from this charter was the danger of carrying deck-cargo in such conditions. On the last voyage from Pnom Penh to Singapore the plaintiff refused to carry any more cargo on deck and he stated in evidence that it was this refusal which in his opinion was the cause of his dismissal. It is not, however, necessary to decide whether this opinion is well-founded since the defendants do not rely upon the plaintiff's refusal to carry deck cargo as a ground for dismissal; instead they rely upon his refusal to obey other orders which they allege they gave him from time to time and also upon certain acts of misconduct which they allege he committed during the three months preceding his dismissal. Originally in their letter of the 29th June 1955 dismissing the plaintiff, the defendants relied upon seven grounds of complaint but subsequently, when they delivered their defence on the 27th July 1955 two of these complaints were omitted and two new ones were mentioned for the first time. I now propose to examine these complaints *seriatim* but before doing so, I think it useful to recall the *dictum* of Mr. Justice Wright, (as he then was) in *Savage v. British India Steam Navigation Co. Ltd.*[1]. In that case, which was similar to the present, in that the plaintiff claimed damages for wrongful dismissal and the defendants relied upon certain acts of misconduct as justifying the dismissal, the learned Judge stated at the outset of his judgment that the onus rested on the defendants to prove that the dismissal was not wrongful. So, in the present case, the onus rests on the defendants to prove that the complaints alleged in the defence are well-founded and justify the dismissal.

The first complaint with which I will deal is the allegation that the plaintiff shouted at and abused the agents of the defendants in foreign ports. The evidence of the defendants on this matter was given by the Chief Officer, Mr. Cook, and the ship's compradore, Sim Peng Chiang. The former merely said that the plaintiff used strong language and that there were arguments from time to time but added that the plaintiff was not quarrelsome in foreign ports; the compradore said expressly that he had never heard the plaintiff shouting at clerks any where. In my opinion this evidence falls far short of establishing this particular complaint against the plaintiff. There was a similar complaint as regards the plaintiff's conduct towards the compradore. It was alleged that on the 17th June 1955, the plaintiff abused the compradore in the foulest language but the compradore himself described it only as strong language and the Chief Officer said in terms that the plaintiff did not use the foulest language. I agree, with respect, with the observation of Lord Maugham in *Jupiter General Insurance Co. v. Shroff*[2] that in cases of this nature one must apply the standards of men, and not those of angels. In my view this complaint is likewise without substance.

Another complaint against the plaintiff is that he ordered the crew not to load a motor car for Pnom Penh on the 17th June 1955 but after hearing the evidence on this matter I am satisfied that this accusation is without any foundation. It is true that when he was first informed by the defendants' shipping manager of the intention to ship a motor car to Pnom Penh, the plaintiff protested vigorously because it meant carrying it as deck-cargo with all the attendant risks of such stowage, and he gave orders that it was not to be put on board unless he was present to supervise the actual loading. But the car was eventually put on board and securely lashed and stowed under the personal direction of the plaintiff and carried to its destination. The defendants' case under this head completely collapsed and indeed it was not persisted in at the conclusion of the evidence.

I now turn to consider an allegation that the plaintiff refused to obey certain orders given to him by the defendants during the three months preceding his dismissal. It is said that on three occasions when the New Susana was in Singapore in the months of April and June, the plaintiff refused to attend on board the vessel whilst the defendants' consulting engineer and the government ship surveyor were carrying out a survey. On this matter there is a conflict of evidence. The plaintiff stated that he was never expressly ordered to be on board during the survey and added that it was sufficient and in accordance with normal practice for the Chief Officer to remain on board and for himself, as master, to be available at the defendants' office on shore in case it should be necessary to refer any particular matter to him for his advice or decision.

The defendants' shipping manager, Lim Tok Seng, on the other hand, asserted that he had instructed the plaintiff to be on board during the survey but at one stage of his evidence qualified this statement somewhat, when he stated that the words "attend to the survey" which he used when giving instructions to the plaintiff meant, in his view, to be present at the survey. Be that as it may, if it is necessary to choose between the plaintiff's account of this matter and that of the defendants' shipping manager, I have no hesitation in preferring the account of the plaintiff. He gave his evidence in a clear and straightforward manner and if he did occasionally express himself with undue emphasis, that is not out of character for a seafaring man and should not, in my view, impugn his credit as a witness. In marked contrast was the demeanour of the defendants' shipping manager. He was hesitant and vacillating and did not impress me favourably as a witness. So far as the practice when conducting surveys is concerned, the Chief Officer, a witness called by the defendants, fully confirmed the plaintiff's view that it was unnecessary for the master to remain on board during a survey. As he put it "Captain Fox was not present for these three surveys but I was there. I knew where to contact him at the office of the defendants. If I was not there, the Captain himself would probably be there — either one of us should be there." In my judgment therefore this complaint against the plaintiff is also groundless.

The next complaint I have to consider is the allegation that the plaintiff wrongfully retained on board the New Susana a number of old life-saving rockets in disobedience to an order of the government ship surveyor. In support of this allegation, the defendants called the government ship surveyor himself and it is clear from his evidence that the rockets on board the New Susana were out of date in April 1955 and that he ordered them to be replaced by new ones and the old rockets thrown overboard. There was some delay in replacing the old rockets, the reason being, according to the plaintiff whose evidence on this point was not contradicted, that there was no stock of new rockets available in Singapore at that time. Eventually, however, new rockets were obtained and installed at the beginning of June but the old ones were not immediately thrown overboard. According to the Chief Officer, they were retained on board for another trip and when the government ship surveyor saw them on the return of the New Susana to Singapore, he insisted they should be thrown overboard and threatened to detain the ship if this was not done. The marine police were then called and they took the rockets away. The evidence of the defendants, therefore, shows that a certain number of old rockets were kept on board for one trip after the new rockets were installed. Although there is some risk that old rockets might go off without being fired owing to the explosives becoming unstable it should be remembered that there is no statutory regulation requiring them to be dumped overboard and the instructions given by the government ship surveyor in this matter were merely departmental in character. I should have thought that if the retention of old rockets involved the safety of the ship or its crew there would have been some statutory regulation dealing with the matter but be that as it may, the risk in this instance does not appear to have been very serious. According to the plaintiff, rockets are not likely to go off without being fired unless they are about ten years old and the rockets which were eventually taken away from the New Susana were only three to three and a half years old. The plaintiff admitted that he retained a few on board in order to give the alarm if the ship was attacked by rebels in the Mekong river but these rockets, he said, were only two years old and could not, therefore, be considered dangerous. In my opinion the defendants have magnified this incident out of all proportion to its importance. This view gains support from the fact that the defendants made no reference to it whatsoever in their letter of the 29th June 1955 dismissing the plaintiff. The complaint appears for the first time in the defence delivered on the 27th July 1955 and it is difficult to escape the conclusion that it was introduced at that stage in an endeavour to fortify a case which the defendants realised badly needed strengthening. In my judgment the evidence on this matter does not establish any serious complaint against the plaintiff and for the purposes of deciding whether the defendants were justified in summarily dismissing him, little or no weight should be attached to it.

A further complaint against the plaintiff is that he obstructed the defendants' contractors when they were engaged in removing fire-fighting equipment, known as the CO^2 system, from the New Susana. This consisted of a system of pipes in the holds and the engine room from which fire-extinguishing gas could be ejected in the event of fire, but as it was costly to maintain and certain alterations were required to the engine room ventilators to make it fully effective, the question was raised by the defendants with their marine surveyors whether it should not be taken out of the vessel altogether and replaced with ordinary foam and portable fire-extinguishers. The marine surveyors in their letter of the 22nd April 1955 to the defendants set out the advantages and disadvantages of the two systems and suggested that the defendants should discuss the matter with the plaintiff before deciding which system to adopt. The plaintiff was strongly in favour of keeping the CO^2 system and this seems. at first, to have been accepted by the defendants because,

according to the evidence of the marine surveyor called by the defendants, instructions were given by him to seal off the engine room because CO^2 systems was to be retained. It is true that later he stopped this work because the defendants had changed their minds but a voyage later the defendants' shipping clerk said the system was to be retained and the marine surveyor thereupon told the workmen to continue the work only to find that as he left the vessel, the defendants' shipping manager came on board and put a stop to the work. It is not surprising that the plaintiff should say, as he did in evidence, that the contractors were very confused by the different orders given to them and that at the time when some of the workmen were engaged in removing the system, others were simultaneously blanking off the engine room ventilators to make it more efficient. The particular matter which the defendants complain of in this context is that the plaintiff on the 16th June 1955 ordered two gas cylinders of carbon dioxide which had been removed from the system to be replaced but the plaintiff explained that the cylinders were lying on deck in the sun and as this was dangerous, he ordered the workmen to put them back into a box out of the sun. I think this is very probably the true explanation of what occurred but whether this be so or not, the evidence of the defendants in regard to this question of removing the CO^2 system is so conflicting and unsatisfactory that it is impossible, in my opinion, to say that they have discharged the onus upon them of proving the allegations which they make against the plaintiff under this head.

Finally I turn to the last of the complaints against the plaintiff. It is the last complaint in more than one sense because the defendants' shipping manager admitted in the witness box that if the plaintiff had not done the things alleged against him under this head, that is to say, if he had not submitted unnecessary indents for ships stores, he would not have dismissed him. It is curious if the complaint was so important that it found no place in the letter of dismissal; like the complaint about the rockets it appeared for the first time when the defence was delivered a month later. But even more surprising is the fact that the Chief Officer, a witness called by the defendants, stated in his evidence in chief that all the stores mentioned in the indents were necessary, though not at that time, and went on to explain that they would have them in stock if the vessel went to a foreign port where these stores were not obtainable. The plaintiff agreed that the lists were very much larger than he normally submitted but he added that matters had reached the stage when he had been given orders by the defendants to cut his repairs and stores lists as much as possible and that the object of these lists of the 29th June 1955 was to protect his successor, Captain Richards, to whom he was about to hand over the vessel. I am satisfied on the evidence that the lists submitted by the plaintiff were not unnecessary and that even though some were not required for immediate use, it was not unreasonable to include these additional stores as reserves against the contingency of the vessel being in a foreign port where they were unobtainable.

That concludes the somewhat lengthy review of the facts of this case and it will be seen that I have reached the conclusion that the defendants have failed to substantiate any of the complaints alleged against the plaintiff. This conclusion is in my view supported by the fact that the defendants themselves never made any complaint, either oral or written, to the plaintiff in regard to these matters prior to the letter of dismissal of the 29th June. Moreover, before the letter of dismissal was handed to the plaintiff, by the ship's compradore, he offered the plaintiff, surprising as it may seem, an additional $200 per month if he would continue to work for the defendants until the completion of his contract, but the plaintiff refused the offer. No issue was raised on the pleadings as to the effect in law of this offer, but it is clear that this attitude on the part of a responsible officer of the defendants is quite inconsistent with the view that the plaintiff had behaved in a way which justified his instant dismissal. It should be remembered that the immediate dismissal of an employee is a strong measure and in my judgment the defendants have completely failed to justify such a measure in this case. Accordingly, therefore, I find that the plaintiff was wrongfully dismissed and is entitled to damages.

As regards the quantum of damages the defendants agree that the plaintiff is entitled to recover as special damages, salary and other emoluments for the period ending on the 27th October 1955 when his contract would have expired, but contend that in accordance with the recent decision in *Beach v. Reed Corrugated Cases Ltd.*[3] in which the principles of *Gourley's*[4] case are applied to damages for wrongful dismissal founded on breach of contract, a deduction of $30 per month should be made in respect of income tax. In my opinion the defendants' contention on this point is sound and accordingly I find that the special damage should be reduced by the amount of income tax the plaintiff would have had to pay making a nett figure of $5,471. The plaintiff, however, contends that he is entitled to recover general damages in addition to these special damages. He stated in evidence that he has been unable to obtain employment as a master mariner since his illegal dismissal although he has tried repeatedly, by advertisement and otherwise, to do so, and he attributes this failure to the manner of his dismissal and to his being black-listed, although he is not able

to say how or by whom he has been black-listed; and for this additional injury, he claims general damages. The principles upon which damages can be awarded for wrongful dismissal were discussed at length by the House of Lords in *Addis v. Gramophone Co.*[5] and it was there clearly laid down that the damages cannot include compensation for the manner of the dismissal, for injured feelings or for loss sustained by reason of the fact that the dismissal of itself makes it more difficult to obtain fresh employment. Lord Shaw of Dunfermline pointed out that wrongful dismissal may be accompanied by circumstances which give rise to a separate cause of action and when this occurs the remedy does not merge with the proceedings for wrongful dismissal but remains available at law to the plaintiff if he wishes to pursue it. So far as the action for wrongful dismissal is concerned, the damages are limited, as Lord Atkinson indicated, to one or possibly, two heads : first, compensation for loss of the emoluments which would have been earned but for the breach of contract, and possibly, secondly, compensation in respect of the time which might reasonably elapse before the plaintiff could obtain fresh employment. Damages under the first head are covered in the present case by the special damages with which I have already dealt. It will be observed that the second head is referred to by Lord Atkinson only as a possible head of damages and there does not appear to have been any decision since that case which has resolved the doubt. I do not, however, find it necessary to decide this point because on the facts of the present case there was a period of four months between the date of the wrongful dismissal and the date when the contract would normally have expired which, in my opinion, was a reasonable period in which the plaintiff could seek fresh employment. The fact that the plaintiff did not obtain fresh employment during this period may have been due, as he thinks, to his being black-listed or to the fact that there was, as the Deputy Shipping Master of the government marine department said in evidence, a surplus of master mariners in Singapore or to some other cause. But whatever the reason, it was not, in my opinion because the period between dismissal and the normal date expiry of the contract was unreasonably short and consequently no damages are recoverable under this head, assuming it to be a legitimate head of damages in a case of this kind. It follows, therefore, that the plaintiff's damages in this case are limited to the sum of $5,471 and there must be judgment for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors : *Ibrahim & Almenoar; Braddell Bros.*

LIM SEAH PONG v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) April 6, 1956]

[Ipoh — Criminal Appeal No. 1 of 1956]

Common Gaming Houses Ordinance, 1953, s. 4(1)(c) — Assisting in the carrying on of a public lottery — Whether "character lottery" is a lottery — Meaning of "distribute or allot".

This was an appeal from the conviction of the appellant on a charge of assisting in the carrying on of a public lottery, to wit the 100, 1,000 and 10,000 characters lottery in contravention of section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. One of the grounds of appeal was that what was being carried on did not amount to a public lottery because the expert's evidence did not make out that money or money's worth was distributed or allotted.

Held: (1) it is not of the essence of a lottery that the fund out of which the prizes are provided should consist only or at all of the sums contributed by those taking part, nor that the amount paid should bear any relation to the total amount paid in by the contributors;

(2) a lottery may involve an element of betting, that is to say, the deliberate selection by the contributor of the event on the occurrence of which he is to be paid;

(3) the "characters lottery" is a lottery and therefore the appellant was rightly convicted.

[**Editorial Note:** This decision differs from that of Wilson J. in **Public Prosecutor v. Lau Ting Kai** (1955) M.L.J. 207. The learned Judge indicated his willingness to give a certificate for further appeal, but no such appeal has been filed. Hill J. in **Public Prosecutor v. Lai Soon Thor & Anor.** (Kedah — Criminal Appeal No. 25 of 1956) expressed his agreement with the views of Thomson J. in this case. Reference may be made to Note on "Characters Lottery — Conflicting decisions" in (1956) M.L.J. xvii.]

Cases referred to :—

(1) *Public Prosecutor v. Lee Ee Teong* (1953) M.L.J. 244, 245.

(2) *Kang Yeow Hooi & Ors. v. Public Prosecutor* (1954) M.L.J. 233.

(3) *Teoh Ng Choon & Ors. Public Prosecutor* (1955) M.L.J. 58.

(4) *Public Prosecutor v. Lau Ting Kai* (1955) M.L.J. 207.

(5) *Public Prosecutor v. Woo Fong* (1955) M.L.J. 235, 236.

(6) *Director of Public Prosecutions v. Phillips* (1935) 1 K.B. 391, 401.

(7) *Barlett v. Parker* (1912) 2 K.B. 497, 502, 503.

(8) *Gordon, Mackay & Co. Ltd. v. Watson* (1936) 2 All E.R. 33, 35.

(9) *Barker v. Mumby* (1939) 1 All E.R. 611.

(10) *Coles v. Odhams Press Ltd.* (1936) 1 K.B. 416, 424, 426.

(11) *Moore v. Elphick* (1945) 2 All E.R. 155, 157, 162.